IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2661 OF 2006

In

SUIT NO.2348 OF 2006

Oshiwara Land Development Company Private Limited & Ors. : Plaintiffs

V/s.

Mohid Constructions & Ors. : Defendants

...

Mr.Aspi Chinoy, Senior Advocate, with Mr.Janak Dwarkadas, Senior Advocate, and Mr.V.V.Kanade i/b. M/s.Mahimtura & Co., for the plaintiffs.

Mr.Virag Tulzapurkar, Senior Advocate, with Mr.J.J.Bhatt, Senior Advocate, Mr.N.G.Thakkar, Senior Advocate, Mr.Ketan Parikh, Mr.Cyrus Ardeshir, Mr.Ravi Gandhi & Mr.Anil Jarial i/b. M/s.Kanga & Co., for defendant nos.1 to 3.

Mr.G.W.Mattos,Asstt.Govt. Pleader for defendant no.4 & 5.

...

CORAM : S.A.BOBDE, J.

Date of Reserving the Order.) : 05.12.2007

Date of Pronouncing the Order.) : 20.12.2007

O R D E R

1. The plaintiffs have sued, inter alia, for a decree of eviction of the defendant nos.1 to 3 from the suit property; for a permanent injunction restraining the said

defendants from entering into the said suit property and from carrying on any construction thereon. They have also sought a decree for demolition of the building indicated in Exh.‘A’ and for setting aside the approvals and orders under which the defendants are purportedly carrying on construction.

2. By this Notice of Motion, the defendants have, inter alia, sought an injunction restraining the defendant nos.1 to 3 from continuing the construction work of buildings "Mohid Heights" or "Suresh Nagar" in the property indicated in green outline on the map at exh.‘A’ and from creating any third-party rights in respect of the area which is already constructed.

3. The plaintiffs claim title over the suit land. The plaintiffs claim to be the successors in interest of the former owners of the land. According to the plaintiffs, the defendant nos.1 and 3 have entered into an arrangement with the defendant no.2, Suresh Nagar (SRA) Co-operative Housing Society Limited and have encroached upon a portion of the land belonging to the plaintiffs. The defendant nos.1 and 3 are making the construction as a part of a scheme for rehabilitation of slum dwellers of the defendant no.5, Maharashtra Housing and Area Development Authority.

4. According to the plaintiffs, the defendants nos.1 to 3 have encroached upon the southern portion of a strip of land which belongs to them while purporting to construct for a scheme of rehabilitation of slum dwellers of MHADA which is sanctioned for another area in Ambivali village, south of the plaintiffs' land. According to the plaintiffs, the area in question is as follows:

There is a boundary line which runs east-west. To the south of that boundary is Ambivali village. To the north of that boundary are villages of Versova and Oshiwara. The plaintiffs claim title to a strip of land which may be either in Versova or in Oshiwara to the north of the boundary. According to the plaintiffs, the defendant nos.1 to 3 have been authorised to construct the rehabilitation building as well as the free-sale building towards the south of the boundary in village Ambivali only. Instead of doing so, the defendants are making construction on north of the boundary over the strip which is the plaintiffs' land.

5. The plaintiffs have instituted Suit no.3429 of 1991 which relates to a larger piece of land, about 95 acres in area, a small portion of which is the subject-matter of the land in this suit against MHADA and the State of

Maharashtra. The subject-matter of the land in this suit is land admeasuring 6240.88 sq. yards equivalent to 5218.13 sq. mtrs., which forms part of Survey No.41 of village Oshiwara. The land is shown on a triangle on the southern-most portion of the strip in colour in the map attached to the Commissioner's report. The land may be conveniently called "land at 'A'", since that portion is called 'A' in most of the maps on record. The larger piece of land is 95 acres 30 gunthas 8 ares, equivalent to 3,87,588.4 sq. mtrs. The Collector wrongly showed the land as part of Survey No.120 of village Versova and, therefore, inter alia, the plaintiffs filed the earlier suit.

According to the plaintiffs, in that suit, this Court appointed a Commissioner who submitted a report dated 7.7.1997 which showed the property as vacant.

6. The plaintiffs rely on the Commissioner's report which refers to the suit property. In particular, the plaintiffs have emphasised that Southern boundary of the property below is Ambivali village in the map.

7. In that suit, this Court passed an injunction order protecting the suit land in the following terms:-

"It is, therefore, agreed that the balance

> portion of 41.21 acres of disputed land shall be fenced by Defendant no.5 at its cost and expenses if not fenced so far. It will be responsibility of Defendant no.5 to ensure that the balance portion of the disputed land admeasuring 41.21 acres is not trespassed or encroached by anyone."

The Court made the defendant no.5 herein i.e. MHADA responsible for protecting the suit land. However, the defendants have recently started making construction on the suit land while executing the SRA scheme which is meant for the land to the south of the border i.e. in Ambivali village.

8. The defendants have opposed the Notice of Motion on the ground that the plaintiffs do not have a prima facie title to the land nor are the defendants making any construction on the plaintiffs' land. They have also opposed the grant of any relief on the ground that the Notice of Motion for injunction suffers from delay, the defendants having completed a large part of the project.

9. Taking up the issue of the plaintiffs' title to the land, according to the plaintiffs, they are successors in interest to the land having acquired title from Byramjee

Jeejeebhoy Private Limited. The mode of succession is, however, not stated in the plaint. According to the plaintiffs, the land in this suit was also the subject-matter of the land in the earlier Suit No.3429 of 1991 in which this Court had appointed a Commissioner and granted an injunction. The area of the land which is the subject-matter of the earlier suit is about 95 acres and is shown in colour in the map at exh.'A' filed along with the additional affidavit of the plaintiffs dated 30.8.2006. The said land is also shown in the map along with the Consent Terms in that suit in a similar coloured strip at exh.'A'. In that suit, the defendant, viz., the State of Maharashtra and the plaintiffs had prepared Consent Terms under which title in the said land at exh.'A' is conferred on the plaintiffs. The said land is clearly shown as the plaintiffs' land from the map attached to the Consent Terms. In fact, it is common ground that this Court has not passed an order in accordance with the Consent Terms and has rejected the request of the parties to do so. An appeal against the rejection is pending. In fact, it is the Consent Terms which gives right to the main objection as to the plaintiffs' title.

10. Mr.Tulzapurkar, the learned counsel for the defendant nos.1 to 3, referred to the following recitals in the

Consent Terms:

> "The Plaintiffs and the Defendants agree that the suit land admeasuring approximately 86 ares and 32 gunthas is a part of Survey No.120, Village Versova, Taluka Andheri, Mumbai Suburban District and is owned by the Defendant No.1 and was transferred to the Defendant No.5."

11. According to the defendants, the above statement is a clear admission by the plaintiffs that the owner of the land is the Government and not they (the plaintiffs) and that the statement to that effect in the Consent Terms filed in Court constitutes an admission made by a party to the suit within the meaning of section 17 of the Evidence Act, which reads as follows:-

> "**17. Admission defined**.-- An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned."

Nor, can it be said that the admission is not relevant vide section 23 of the Evidence Act which reads as follows:-

> "**23. Admissions in civil cases, when relevant**.-- In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.
>
> Explanation.-- Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126."

12. Mr.Chinoy, the learned counsel for the plaintiffs, however, submitted that the statement that the State is the owner of the land must be read in the context of the Consent Terms whereby half of the land, admitted by the plaintiffs as belonging to the Government comes back to the plaintiffs under the Consent Terms. In other words,

according to the plaintiffs, the statement that the Government owns the land is valid only if half the land comes back to the plaintiffs as contemplated by the Consent Terms. Since the Consent Terms have been rejected by the Court, the statement cannot be construed as an admission binding the plaintiffs. There is no merit in the submission. 'Admission' is defined by the Evidence Act in section 17 as clearly the said statement amounts to an admission. There is no doubt that under the Evidence Act, an admission may be withdrawn or explained away when it can be shown as untrue or made under a mistake. It is not the plaintiffs' case that the statement constituting an admission is untrue or mistaken. It may be noted that whether a statement constitutes an admission or not cannot be allowed to depend on whether the Court accepts the Consent Terms in which such a statement is made as valid or binding. The statement and the admission therein comes into effect when made by a party to a litigation and presented to the Court. I am, therefore, of view that prima facie there is a serious doubt about the plaintiffs' title to the suit land that the land referred to in the portion marked 'A' in the map annexed to the Consent Terms.

13. The question whether the defendants have encroached into and are carrying on construction on the suit land

belonging to the plaintiffs may now be considered. As observed earlier, according to the plaintiffs, the defendants have encroached into and are carrying on construction of that part of the land admeasuring about one acre and forming part of a larger area referred to in the Commissioner's report as the suit property bounded on the south by the boundaries of Ambivali village. The suit land is thus about one acre and is located at the southern portion of the strip of land shown in the map along with the Commissioner's report at exh.'A'. The suit land is shown in that map in yellow and red and is triangular in shape. There are no measurements of the suit land written in this map annexed to the Consent Terms which are on record as exh.'B' to the affidavit-in-reply of the defendants. The said land is shown in the same way and is shown as admeasuring 39,791.46 sq. mtrs. The defendants are said to have encroached upon and are said to be making construction on the southern strip of this piece of land referred to as 'A'. The said construction is shown in the map annexed to the affidavit-in-reply dated 17.5.2006 at exh.'E'. According to the plaintiffs, the portion on which the defendants are constructing i.e. 'A' is the land belonging to them. They base this claim on the Commissioner's report in the earlier suit, viz., Suit no.3429 of 1991 and the map annexed thereto. The

plaintiffs' contention is that the disputed land in the earlier suit claimed by them and protected by the Court by an injunction order is the strip of land running north-south. On the southern-most portion of the strip is the boundary of Ambivali village. According to them, it is the land which is similarly shown in the map annexed to the Commissioner's report. The plaintiffs say that the defendants are entitled to make construction under the S.R.A. scheme only in Ambivali village, but they are, however, constructing on a portion towards the north of that boundary, all of which is the plaintiffs' land. In other words, according to the plaintiffs, the defendants may be entitled to construct in Ambivali village which is on the southern side of the plaintiffs' property which is bounded by the boundary of Ambivali village, but are not entitled to make any construction of any portion to the north because the entire land towards the north belongs to the plaintiffs as stated in the Commissioner's report and the map. The plaintiffs submit that the defendant no.1 realised that they were making construction in Versova village which is towards the north of Ambivali village and, in fact, that is evident from their letter dated 15.12.2005 written to the Collector, Mumbai Suburban district, in which the defendants have written that "there is a possibility that some part of slum rehabilitation project of Suresh Nagar

Co-operative Housing Society may be in village Varsova and some part in village Ambivali". In fact, the defendants sought for fixing of the boundaries of the plot. On inquiry made by the Collector, the City Survey Officer wrote a letter dated 23.12.2005 stating that it appears that the area of the slum rehabilitation project of M/s.Mohid Construction company is in City Survey Vesave (Versova), taluka Andheri. The plaintiffs rely on the fact that the Collector, Mumbai Suburban District, in fact, by an order under section 135 of the Maharashtra Land Revenue Code dated 7.1.2006 rectified the boundaries. He observed in his order that part of the construction of the defendant no.1 is in the area of 1927.4 sq. mtrs. out of City Survey no.825/1, situate at village Ambivali and part of which is an area of 4262.6 sq. mtrs. out of City Survey no.1374-A part situate at village Vesave (Versova), totalling to 6190.0 sq. mtrs. and the same is divided into two villages and two survey numbers. The Collector, therefore, rectified the boundary by reducing 4262.6 sq. mtrs. in City Survey no.825/1 from Vesave (Versova) and including the same area in City Survey no.1374-A of Ambivali. In fact, MHADA also wrote a letter to the S.R.A. referring to the litigation and requesting that the work of slum rehabilitation being carried out by the defendants be stopped in view of the plaintiffs' contention that the

land given to the defendants under the Slum Rehabilitation Scheme is in respect of land either of village Versova or village Oshiwara. On the strength of the aforesaid documents, the plaintiffs contend that there is no doubt that the defendants have encroached into and are making construction on a portion north of the boundaries of village Ambivali and all of which is necessarily the plaintiffs' property primarily because the Commissioner's report and the map in the earlier suit show that the southern-most part of the plaintiffs' property is bounded by the Ambivali village, though it must be noted that the map does not show Ambivali village boundary on the south. It would have been possible to uphold the plaintiffs' contention on the basis of the Commissioner's report and the map annexed thereto read with the defendants' letter and the Collector's rectification order which shows that the defendants are constructing in an area to the north of Ambivali village, on the basis that everything to the north of the boundary of Ambivali village belongs to the plaintiffs. However, prima facie, that cannot be done in this case. The defendants submit that there is no merit in the plaintiffs' contention that everything north of the boundary belongs to them. According to the defendants, even if it is assumed that they are constructing on a portion to the north of the boundary, they are not doing

so on the plaintiffs' land. Their argument runs thus.

14. Though the Commissioner's report shows that to the south of the plaintiffs' land is the boundary of Ambivali village, the map which is annexed to the Commissioner's report shows the land belonging to the plaintiffs in a coloured strip with an angular border on the south without mentioning Ambivali village. This portion has, in fact, been shown identically in the map annexed to the Consent Terms filed in that suit showing the measurement of 39,791.46 sq. mtrs. The defendants then point out that, in fact, this very portion was measured by the TILR who had also prepared the earlier map and the TILR has made a report on 1.3.2007 along with the map which shows that the plaintiffs' portion does not measure 39,791.46 sq. mtrs., but in fact measures 46,703.50 sq. mtrs. In fact, the map annexed to the TILR's report shows that the same plot of land which is shown as belonging to the plaintiffs in the map annexed to the Commissioner's report and the map annexed to the Consent Terms admeasures as above and the area over which the defendants are constructing i.e. Suresh Nagar (SRA) Co-operative Housing Society Ltd. is on a portion outside the plaintiffs' property. Thus, according to the defendants, the plaintiffs certainly own the property towards the north of the property where the defendants

are constructing, but that property is beyond the portion where the defendants are making their construction.

15. In my view, the defendants' contention appears plausible. The very same area shown in the map annexed to the Commissioner's report and the Consent Terms have been measured by the TILR who has found that the plaintiffs' area is more than 39,791.46 sq. mtrs. shown in the map to the Consent Terms and the area over which the defendants are constructing is below that area. This situation casts a serious doubt on the plaintiffs' case that the defendants are constructing on the plaintiffs' land.

16. Mr.Chinoy, the learned counsel for the plaintiffs, vehemently contended that the map produced by the defendants be rejected since it is prepared mala fide and also contrary to the principles of taking measurements of land. It is not possible to accept this contention since the map and the report are prepared by a competent officer of the City Survey Department and MHADA i.e. TILR. It is not possible to reject the map as being wrong because, according to the plaintiffs, the measurement has been commenced from the northern side of the property and not from the southern side. In fact, according to the defendants, it was perfectly permissible

and indeed desirable that the Surveyor starts taking measurements from the northern side of the property because there is a natural boundary in the form of a creek. Be that as it may, I am of view that the map in question cannot be discarded unless the Surveyor who has prepared the map is given an opportunity to explain how he prepared the map and his methods are found wrong. I am, therefore, of view that prima facie, the plaintiffs' case cannot be accepted in toto that the defendants are constructing on the plaintiffs' land.

17. This brings us to the question of delay and laches raised by the learned counsel for the defendants. According to the defendants, the land on which they are constructing was certified as a slum on 6.1.1997. Annexure '2' of the Notification contains a list of all slum dwellers. The Slum Rehabilitation Authority issued a Letter of Intent in favour of the defendant no.1 approving their proposal for grant of 1.66 F.S.I. for slum rehabilitation on 30.8.1997 after which the defendant no.1 entered into a separate agreement with each of the eligible slum dwellers. Intimation of the approval of the construction of the first rehabilitation building was issued on 10.9.1997. On 2.1.1998 the second intimation of approval was issued by the S.R.A. Thereafter, permissions were granted for construction of

the first sale building called "Mohid Heights", which is a 21-storeyed structure. The contraction of Mohid Heights has already been completed and the construction of the second sale building i.e. Sunbeam Tower has commenced. According to the defendants, the Slum Rehabilitation Scheme comprises of two aspects, one is the construction of rehabilitation buildings for relocation of slum dwellers which is to be done by the developer from his own cost and the construction of the free sale building which the developer is entitled to sell and make his profit. According to the defendants, it is almost as if the plaintiffs waited for the defendants to relocate the slum dwellers from their land and rehabilitate them in the rehabilitation building which was constructed and then further wanted to move this Court for an injunction after the construction of free sale building was completed. Mr.Chinoy, the learned counsel for the plaintiffs, submitted that the plaintiffs were not aware of the construction and, in any case, the plaintiffs did not keep an eye on the property since it is already protected by an injunction under which MHADA was directed to look after the property. It must be noted that in the plaint, the only statement that appears to have been made is that the plaintiffs "recently" noticed construction. It is difficult believe that the plaintiffs could not have noticed this construction

coming up, particularly the construction of Mohid Heights, which is a 21-storeyed building on their land. It is not as if the plaintiffs were not keeping an eye at all since they did eventually notice it and filed the suit sometime on 4.8.2006. There was no reason why this could not have been done earlier. I am, therefore, of view that it would not be appropriate to grant the equitable relief of injunction in the circumstances of the case. Indeed, if the land eventually held in either of the suits as belonging to the plaintiffs, they would be entitled to claim compensation on that basis. However, though an injunction is liable to be refused, I am of view that the defendants should not dispose of or deal with the suit property or any flat constructed thereon without giving notice of the pending dispute to the intending purchasers and without keeping an account of the disposition made which is hereby ordered.

18. It may be noted that the plaintiffs have not pressed for the relief of an injunction of the orders passed by the statutory authorities.

19. In this view of the matter, the Notice of Motion is hereby dismissed.

20. Mr.Dwarkadas, the learned counsel for the

plaintiffs, prays for continuation of the ad-interim order in terms of prayer clause (d) in respect of building Sunbeam, building no.2, as granted by this Court on 11.10.2006. The learned counsel for the defendants opposes this request. However, in the circumstances of the case, the ad-interim order shall continue for a period of eight weeks from today.

S.A. BOBDE, J.